

STATE OF MICHIGAN  
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July 3, 2024

The Honorable Robert J. Jonker  
United States District Court, Western District of Michigan  
685 Federal Building  
110 Michigan St. NW  
Grand Rapids, MI 49503

Re: Enbridge's Oral Argument Request  
*Enbridge Energy, Limited Partnership, et al. v. Whitmer, et al.*  
Case No. 1:20-cv-1141-RJJ-RSK

Dear Judge Jonker:

The purpose of this letter is to respond to the June 28, 2024 letter filed in the above-referenced case on behalf of Enbridge Energy, et al. (Enbridge) (ECF No. 92), and to inform the Court of a new development.

In its letter, Enbridge asks the Court to promptly hold oral argument on two pending motions: (1) Defendants' motion to dismiss on sovereign immunity grounds; and (2) Enbridge's motion for partial summary judgment. Enbridge did not confer with the Defendants, Governor Gretchen Whitmer and Michigan Department of Natural Resources Director Scott Bowen, before filing the letter.

The Governor and the Director respectfully submit that their pending motion to dismiss should be ruled upon promptly. That motion raises Eleventh Amendment sovereign immunity as a threshold issue. (ECF Nos. 62, 63.) The Sixth Circuit has held that the Eleventh Amendment is a "true jurisdictional bar," which, "once raised as a jurisdictional defect, must be decided before the merits." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). Accordingly, the Governor and Director's motion to dismiss must be decided *before* addressing Enbridge's motion for partial summary judgment.

Addressing the Governor and Director's motion first is particularly necessary because the Eleventh Amendment provides immunity from suit, not merely immunity from judgment. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–46 (1993). If that motion is denied, the Governor and Director have a right to an immediate appeal, *id.* at 142–44, which would need to be

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decided before ruling on Enbridge's motion for summary judgment. And of course, if the Governor and Director's motion is granted, it will eliminate the need to consider Enbridge's motion at all. Thus, it is appropriate to promptly consider the Governor and Director's pending motion to dismiss. The Governor and Director welcome oral argument, but recognize that whether to hold oral argument is left to this Court's sound discretion. *See* W.D. Mich. LCivR 7.2(d).

Additionally, the Governor and Director wish to apprise the Court of their intent to file another motion arising from the United States Court of Appeals for the Sixth Circuit's recent decision ordering that a substantially similar, parallel case be remanded to state court. *Nessel v. Enbridge*, No. 23-1671, 2024 WL 3024514 (6th Cir. June 17, 2024).

With *Nessel v. Enbridge* headed back to state court, it is appropriate for this Court to abstain from deciding the merits of this case while substantially similar legal and factual issues are addressed in that action. Abstention was not previously an available argument in this case, because *Nessel v. Enbridge* was also before this Court. That is no longer the case. The Governor and Director's forthcoming motion is based on this new development, and should be addressed before Enbridge's pending motion for summary judgment.

For these reasons, the Governor and Director respectfully request that the Court promptly consider their pending motion to dismiss based on Eleventh Amendment sovereign immunity. (ECF Nos. 62, 63.) Only if that motion is denied, and after any appeal has been exhausted, should the Court consider the Governor and Director's forthcoming motion based on abstention and Enbridge's pending motion for partial summary judgment.

Sincerely,

/s/ Daniel P. Bock

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LF: Enbridge Straits (Dec & Inj Relief) (v DNR) WD/AG# 2020-0306464-A/Letter – Jonker 2024-07-03